

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

RICHARD G. CONVERTINO,

Plaintiff,

v.

Case Number: 07-CV-13842

UNITED STATES DEPARTMENT OF JUSTICE,

Defendant.

**ORDER GRANTING IN PART AND DENYING IN PART NON-PARTY RESPONDENT
DAVID ASHENFELTER'S EMERGENCY MOTION**

Pending before the court is Non-Party Reporter David Ashenfelter's "Emergency Motion to Authorize *Ex Parte, In Camera* Submission, And To Stay the Court's February 26, 2009 Order In the Interim." Ashenfelter's motion seeks to (1) allow the submission of an *ex parte, in camera* affidavit in support of his privilege argument, (2) have this court deem that the submission does not waive any privilege, (3) be assured that the submission will not be provided to any other person, (4) be permitted to present "further argument" in support of his affidavit, and (5) stay this court's February 26, 2009 order requiring the setting of a schedule of Ashenfelter's deposition before March 6, 2009. Plaintiff, as reported by Ashenfelter, does not disagree. The court now addresses each in turn.

First, Ashenfelter's plan to submit an affidavit, *ex parte* and *in camera*, was explicitly contemplated by the court in its February 26, 2009 opinion and order. (2/26/09 Order at 10, n.9.) The court will, of course, allow a submission it invited. Further, the court cannot conceive of how choosing the court's own proposed method of offering a

factual basis to support a privilege could be deemed to result in any waiver of a privilege. Next, the very nature of an *in camera* review protects against dissemination to any unauthorized person. Moreover, although the court plans to make Ashenfelter's affidavit and any subsequent argument a part of the record in this matter, the affidavit itself will remain under seal and unavailable for public disclosure unless and until there is a further order of a court to make it so.

To the extent Ashenfelter seeks to bolster his proposed affidavit with subsequent argument, the court will deny his motion. After reviewing the intended affidavit, the court will be in a better position to determine if further argument is required. Likewise, Ashenfelter's request to stay the court's February 26, 2009 directive to schedule and appear for an additional deposition will be denied. As Ashenfelter makes clear, "Plaintiff's counsel and [Ashenfelter's counsel] have already discussed mutually acceptable deposition dates . . . in April." (Ashenfelter's Mot. at 6, n.11.) The court sees no reason why, in light of likely acceptable dates in April, the parties cannot notify the court by March 6, 2009 of an agreed upon date to take Ashenfelter's additional deposition.

Accordingly, IT IS ORDERED that Ashenfelter's "Emergency Motion to Authorize . . . Submission" [Dkt. # 52] is GRANTED IN PART and DENIED IN PART. Specifically, it is GRANTED to the extent that Ashenfelter wishes to submit an affidavit for *ex parte*, *in camera* review. Ashenfelter is DIRECTED to submit his affidavit directly to the chambers of the undersigned judge on or before **March 6, 2009 at 5:00 p.m.** under seal, in a secured envelope with an instruction printed thereon that the envelope is "to be opened only at the direction of Judge Cleland."

IT IS DENIED to the extent Ashenfelter seeks to provide further argument *ex parte* at this time. IT IS FURTHER DENIED to the extent Ashenfelter seeks to stay this court's February 26, 2009 order. That order set a **March 6, 2009** deadline, by which the parties must provide this court with a date for Ashenfelter's deposition, to occur at the courthouse and while the undersigned judge is available. The deadline remains fully in effect.

s/Robert H. Cleland

ROBERT H. CLELAND
UNITED STATES DISTRICT JUDGE

Dated: March 4, 2009

I hereby certify that a copy of the foregoing document was mailed to counsel of record on this date, March 4, 2009, by electronic and/or ordinary mail.

s/Lisa Wagner

Case Manager and Deputy Clerk
(313) 234-5522